

Federal Communications Commission

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 97M M-140
71706

In re Applications of

Martin W. Hoffman
Trustee-in-Bankruptcy for
Astroline Communications Company
Limited Partnership

MM Docket No. 97-128

For Renewal of License of
Station WHCT-TV,
Hartford, Connecticut

File No. BRCT-881201LG

and

Shurberg Broadcasting of Hartford

For Construction Permit for a New
Television Station to Operate on
Channel 18, Hartford, Connecticut

File No. BPCT-831202KF

MEMORANDUM OPINION AND ORDER

Issued: August 20, 1997; Released: August 21, 1997

1. Under consideration are the following:

Petition for Emergency Relief and Stay of Proceedings, filed
July 25, 1997, Richard P. Ramirez ("Ramirez");

Comments on Petition for Emergency Relief and Stay of
Proceedings, filed August 5, 1997, the Mass Media Bureau
("Bureau");

Comments in Support of Petition for Emergency Relief and
Stay of Proceedings, filed August 5, 1997, by Two If By Sea
Broadcasting Corporation ("TIBS");

Comments in Support of Petition for Emergency Relief and
Stay of Proceedings, filed August 5, 1997, by Martin W.

Federal Communications Commission

Hoffman, Trustee-in-Bankruptcy for Astroline
Communications Company Limited Partnership ("Trustee");

Opposition of Shurberg Broadcasting of Hartford ("SBH") to
Petition for Emergency Relief and Stay of Proceedings, filed
August 5, 1997; and

Consolidated Reply of Richard P. Ramirez to Comments of
Mass Media Bureau and Opposition of Shurberg Broadcasting
of Hartford, filed August 15, 1997.

2. In December 1984, the Commission granted the distress sale assignment of WHCT-TV's license to Astroline Communications Company Limited Partnership ("ACCLP"). Ramirez (of Hispanic origin) is one of the general partners of ACCLP who allegedly had a 21 percent ownership interest and a 70 percent voting interest. The general and limited partners of ACCLP asserted that they will structure all transactions to maintain Ramirez' voting control over the affairs of the company and to insure that minority group persons have at least a 21 percent ownership interest in ACCLP. HDO, ¶3.

3. The competing applicant Shurberg charges that these representations were untrue because, as indicated in a pleading filed by the Trustee with the Bankruptcy Court, the non-minority participants who ACCLP had represented to the Commission as limited partners held themselves out to be general partners in formal documents related to ACCLP's relationship with a financing bank. HDO, ¶5. Shurberg also has provided an excerpt from a brief filed by the Trustee in a certain pleading in which the Trustee asserted that the ACCLP's supposed 21 percent minority owner actually held less than one percent of the licensee "[n]otwithstanding the FCC minority preference guidelines." HDO, ¶7. In light of these assertions the Commission designated for hearing the issue whether ACCLP misrepresented facts to the Commission and the Federal Courts in connection with statements it made concerning the status as a minority controlled entity.

4. By its Petition, Ramirez seeks to stay this proceeding and to delete the misrepresentation issue designated against ACCLP.

5. In support of his requests, Ramirez avers that the pleadings upon which Shurberg relied to support its allegations and the facts presented therein were fully litigated in, and disposed of, by the Federal Courts wherein it was determined that Ramirez was in control of ACCLP and that ACCLP's limited partners did not act as general partners.

Federal Communications Commission

6. Additionally, Ramirez charges that the Commission arbitrarily and capriciously refused to apply the Second Thursday¹ doctrine in basing its decision on an erroneous depiction of the facts, rendering its decision irreconcilable with Commission action in similar cases.

7. Ramirez' Petition must be denied on procedural grounds. Although it is styled as a petition for emergency relief it is, in effect, a petition for reconsideration of a hearing designation order. The Presiding Judge has no authority to grant such relief. See Section 1.106(a) of the Commission Rules.

8. Secondly, Ramirez' pleading also seeks to have the representation issue deleted. This request is late filed. Section 1.229(a) of the Commission Rules provides that a motion to delete must be filed within 15 days after the Federal Register publication of the designation order or summary thereof. Section 1.229(b)(3) states that if the motion is late filed, it will be granted only if good cause is shown for the delay in filing. Ramirez made no such showing in his Petition. The HDO herein was released on April 28, 1997. Ramirez filed his Petition for Leave to Intervene on May 29, 1997. Ramirez attended the prehearing conference herein on June 2, 1997. The instant HDO summary occurred on June 9, 1997. Ramirez was granted leave to intervene on June 20, 1997, but did not file his request to delete issue until July 25, 1997, well after the 15 day deadline specified in Section 1.229(a) and more than 15 days after being granted leave to intervene. It is deemed that Ramirez had ample time to raise the issue timely, or to seek leave to file late but failed to do so. Nor did Ramirez directly address the good cause requirement of Section 1.229(b)(3) in his Petition.

9. Ramirez' Petition also must be denied on its merits. As the Bureau notes, the litigation in Bankruptcy Court focused on whether the limited partner of ACCLP was liable as a general partner for certain debts for having participated in the control of ACCLP's business substantially the same as in the exercise of a general partner. After a trial the Bankruptcy Court concluded "[ACCLP limited partners'] activities in connection with the Debtor do not meet the standard of substantially the same as the exercise of the powers of a general partner." In re Astroline Communications Co. Ltd., 188 B.R. 98, 100 (Bank. Ct. D. Conn. 1995). This decision was essentially affirmed by the United States District Court and the 2d Circuit Court of Appeals.

¹ In Second Thursday Corp., 22 FCC 2d 515, recon. granted, 25 FCC 2d 112 (1970), the Commission created an exception to the general rule that a licensee may not transfer facilities involved in a hearing concerning its character qualifications unless it is found qualified to remain a licensee. Under Second Thursday, a licensee in bankruptcy may assign its license if the individuals charged with misconduct will have no part in the proposed operations and will either derive no direct benefit from favorable action on the assignment or will receive only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors.

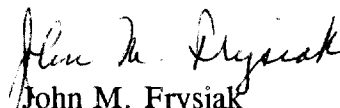
Federal Communications Commission

10. In opposition to Ramirez' Petition it is argued that putting the question of control aside the Bankruptcy Court made no finding relative to Ramirez' ownership interests in ACCLP. Although the Bankruptcy Court decision noted Ramirez' ownership interest at 21 percent at inception, such finding is far from dispositive in resolving the question of whether Ramirez' ownership interests in ACCLP dropped below 20 percent during the period 1984-1991. The opponents have submitted federal income tax filings which suggest that Ramirez owned less than one percent of ACCLP while ACCLP was representing otherwise to the Commission. Pursuant to the Commission's minority distress policy ACCLP's minority owners not only had to have legal control but also at least a 20 percent ownership interest. Faith Center, Inc., 99 FCC 2d 1164, 1173 (1984). It is clear that the Federal Courts did not decide all relevant matters regarding compliance with the Commission's minority distress sale policy. Deletion of the misrepresentation issue is not warranted. A question of probable decisional significance has been adequately raised and has to be resolved at hearing.

11. Ramirez' claim that the Commission's decision was arbitrary and capricious because Hoffman was not accorded Second Thursday relief must also be rejected. The Commission's decision not to consider such relief is fully explained in the HDO, (see ¶11) and is not subject to review by the Presiding Judge. See Atlantic Broadcasting Company (WUST) et al., 5 FCC 2d 717, 720 (1966). That the Commission in MobileMedia allowed the licensee therein to pursue Second Thursday relief is of not significance as the facts and circumstances for granting the relief therein differ significantly from those considered in the instant proceeding.

Accordingly, IT IS ORDERED that the Petition for Emergency Relief and Stay of Proceedings, filed July 25, 1997, Richard P. Ramirez IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION


John M. Frysiaak
Administrative Law Judge